No. 24-386

IN THE

Supreme Court of the United States

OCTOBER TERM 2024

KARL FISCHER, ET AL.,

Petitioners,

v.

THE STATE OF NEW LOUISIANA,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

BRIEF FOR PETITIONERS

Team #24
Counsel for the Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

QUESTION PRESENTED

II. Whether the controversial precedent established in *Kelo v. City of New London* should be overruled, and if so, what principles should define a constitutionally permissible taking that genuinely serves a legitimate public use?

III. Whether property owners may seek remedy for a taking by relying on the Fifth Amendment as a cause of action when the property owners are denied the constitutional right to recover under state law?

STATEMENT OF THE CASE

A. Procedural History

On March 15, 2023, Karl Fischer along with ten other property owners ("Petitioners") filed suit against New Louisiana ("Respondent") demanding temporary and permanent injunctive relief for violations of the Takings Clause. R. at 3. Shortly thereafter, Respondent moved to dismiss the lawsuit under Federal Rules of Civil Procedure 12(b)(6). *Id*. On June 28, 2023, District Judge Roy Ashland granted Respondent's motion. *Id*. at 8. In response, Petitioners made a timely appeal to the United States Court of Appeals for the Thirteenth Circuit. *Id*. at 9. On March 13, 2024, the Appellate Court affirmed the district court's holding. *Id*. at 11. Thereafter, a timely petition to the United States Supreme Court by Petitioners was filed. On August 17, 2024, the United States Supreme Court entered an order granting writ of certiorari. *Id*. at 20.

B. Statement of Facts

Karl Fischer is the owner of a small farm that has been cherished by his family for 150 years. *Id*. at 3. The farm, while modest, is rich in family history that expands generations deep. *Id*. at 2. With this rich history, comes almost two centuries of strong sentimental values that not only have connections to the land itself, but also to the surrounding community. *Id*. at 2-3. Like Mr. Fischer, the property owners within the community also have tight generational bonds to their lands. *Id*. These priceless sentiments and values held by the property owners are the reasons they refused to give up their land and encouraged the initiation of the present litigation. *Id*. at 3.

This litigation begins with the state of New Louisiana's desire to take the property owner's land to construct a luxury ski resort. *Id*. at 2. The State alleges that the private use of the land will attract wealthy tourist, add new jobs, and increase tax revenue. *Id*. For the property owners to recover just compensation for the taking, New Louisiana law requires that the State wave sovereign immunity. NL Code § 13:5109. However, because New Louisiana refused to waive sovereign

immunity, every property owner who was at risk was denied the right to seek just compensation under New Louisiana law. R. at 2. Through Respondent's strategy the State was able to obtain land from 90 owners for well below fair market value. *Id*. With Karl Fischer and his neighboring property owners remaining steadfast in resisting the State's offers, the State filed eminent domain proceedings and began construction on the purchased property. *Id*. at 3. Two days later, Karl Fisher as the lead plaintiff alongside the other property owners, initiated this lawsuit seeking temporary and permanent injunctive relief for violations of the Takings Clause under the Fifth and Fourteenth Amendments of the United States Constitution. *Id*.

C. Standard of Review

The case at bar involves legal issues that arose from violations of the Takings Clause. This Court reviews cases concerning constitutional or statutory claims under a *de novo* standard of review. *McNary v. Haitian Refugee Ctr., Inc.*, 489 U.S. 479, 493 (1991). Under a *de novo* standard of review, the appellate court may freely overturn the holdings of the trial court and does not need to give deference to its legal analysis. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 453-454 (4th Cir. 1999).

SUMMARY OF THE ARGUMENT

The Framers of the United States Constitution believed that property rights are fundamental to individual liberties. This principle was codified by the Framers through the Takings Clause by expressly limiting the government's power to take private property for only public use and demanding that property owners receive just compensation. However, this principle has been eroded by the Court's decision in *Kelo v. City of New London*. Accordingly, this Court should overturn *Kelo* because it blurs the line between private and public use under the Takings Clause and weakens the protections the Framers intended to secure. Here, the doctrine of stare decisis does not compel the Court to reaffirm *Kelo* because it is fundamentally flawed, poorly reasoned, inconsistent with related precedent, and minimally relied on. As well, this Court should revert back to the Framers' narrow definition of public use to protect property owners from potential abuses by the government.

Similarly, the nature and characteristics of the Takings Clause shows that it is self-executing and allows for a claimant to rely on it as a cause of action to recover just compensation. This principle is grounded by the Framers' intent because they were strong defenders of property rights. Additionally, the mandate for just compensation within the provision makes clear that claimants do not need to rely on another source of law to recover. Further, this Court's almost century old precedent has long embraced that the Takings Clause is self-executing and can be used as a procedural vehicle to recover just compensation. Lastly, the history of takings litigation rejects Respondent's assertion that statutory recognition is required to recover under the Takings Clause. Early takings cases in both federal and state court reveal that claimants regularly sought relief directly under the Fifth and Fourteenth Amendments without objection.

ARGUMENT

I. *KELO V. CITY OF NEW LONDON* OUGHT TO BE OVERTURNED DUE TO ITS BROAD INTERPRETATION OF PUBLIC USE, WHICH JUSTIFIES VIRTUALLY ANY EXPORIATION OF PRIVATE PROPERTY

The Takings Clause of the Fifth Amendment, incorporated to the states through the Fourteenth Amendment, provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Framers of the United States Constitution drafted the Takings Clause with the intent to limit the government's power by mandating that all seizures of private property serve a legitimate public use. *Kelo v. City of New London*, 545 U.S. 469, 505–06 (2005) (Thomas, J., dissenting). By expressly narrowing the scope of a valid taking to only public use, the Framers sought to protect property owners by preventing arbitrary takings by the government. However, this Court's decision in *Kelo v. City of New London* expanded the scope of what constitutes a "public use" beyond its original meaning. *Id*. at 489-90. Today, the concept of public use has been stretched to include the transfer of land from one private party to another when there is a potential for economic growth. *Id*.

A. Interpreting Public Use To Encompass Economic Development Sets A Dangerously Low And Speculative Standard, Allowing Courts To Justify The Taking Of Private Property With Minimal Justification.

The possibility of upgrading private property does not justify its seizure and transfer to another. Relying on the language "economic development" to justify a taking will "wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." *Id.* at 494 (O'Connor, J., dissenting). The *Kelo* decision blurs the line between private and public use, thereby weakening the protections of property rights under the Fifth Amendment the Founders intended to preserve. In *Kelo*, The City of New London pursued a development plan with the goal to revitalize its economy. *Id*. at 475.

While New London was able to purchase many properties to complete the plan, Susette Kelo and Wilhelmina Dery refused to sell. *Id*. This Court ultimately held that New London's development plan served a public purpose under the Takings Clause of the Fifth Amendment. *Id*. at 489–90. This Court reasoned that although the properties were not blighted, the potential economic development qualified as a valid public use. *Id*. Additionally, the *Kelo* Court rejected any distinction that would exclude economic development from the broad definition of "public purpose." *Id*. As Justice O'Connor's acknowledged in her dissenting opinion, the *Kelo* decision renders "all private property . . . vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting). Consequently, the Court's decision in *Kelo* directly undermines the constitutional safeguard against government overreach established by the Framers when drafting the Takings Clause.

i. Stare decisis is a guiding principle, not an inflexible rule, and is intended to be reexamined when warranted.

The doctrine of stare decisis provides that "a court must follow earlier judicial decisions when the same points arise again in litigation." Stare Decisis, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw. When dealing with the Constitution, this Court has held that stare decisis is at its weakest point because "[the Court's] interpretation can be altered only by constitutional amendment or by [the] overruling [of] prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). While stare decisis can promote uniformity within the judiciary, this Court has previously chosen to overrule longstanding precedent in certain circumstances. *See Ramos v. Louisiana*, 590 U.S. 83, 93, 105 (2020). For instance, this Court in *Loper Bright Enterprises v. Raimondo* chose to abandon the doctrine and overrule 40 of years precedent established in *Chevron U.S.A Inc., v. Natural Resources Defense Council, Inc*. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2270 (2024). This Court concluded in *Loper* that because *Chevron*'s framework no

longer serves its proper function of judicial review in matters of agency interpretation, it must be overturned. *Id*. at 2270. As well, in *Dobbs v. Jackson Women's Health Organization*, this Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, concluding that the fundamental weaknesses in these precedents did not mandate adhere to stare decisis. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 270 (2022). Accordingly, this Court has a well-established history of overruling precedents when warranted by circumstances like *Loper* and *Dobbs*, demonstrating its discretion in applying the doctrine of stare decisis.

ii. Stare decisis does not preclude overruling decisions that deviate from constitutional principles

This Court has recognized that it "has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). When determining whether to overrule prior decisions this Court considers: (1) the quality of the reasoning; (2) the workability of the rule; (3) its consistency with other related decisions; and (4) the reliance on the decision. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018).

a. Quality of the Reasoning

The *Kelo* decision is fundamentally flawed, as it misconstrues the meaning of public use, and diverges from the original intent of the Takings Clause. The Framers intended public use to have a limited meaning because they were concerned that “powerful factions interested in acquisition of more property would influence the legislature for their own benefit at the expense of the less powerful...” Micheal J Coughlin, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule,* 54 CATH. U. L. REV. 1001, 1006 (2005). As Justice Thomas noted in his dissenting opinion in *Kelo*, if public use was meant to encompass overbroad terms such as economic development, “[t]he Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope.” *Kelo*,

545 U.S. at 509 (Thomas, J., dissenting). For instance, while the broader term "general welfare" appears in other sections of the Constitution, the Framers deliberately chose the specific phrase public use to underscore a critical distinction between the two concepts. *Id*. Accordingly, the analysis in *Kelo* disregards this meaning of public use, by abandoning the Framers' strong interest in protecting property rights. Expanding the interpretation of public use is unsound, as it erodes the constitutional safeguards against protentional abuses of governmental power and private developers' ability to seize private property based on speculative economic benefits that may never come to fruition. Overruling *Kelo* will reestablish the Framers' original intent of the Takings Clause; thereby ensuring that property owners are protected against potential abuse of eminent domain.

b. Workability of The Rule

When this Court finds that decisions are unworkable or badly reasoned it never feels constrained to follow precedent. *Payne*, 501 U.S. at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). For instance, in *Knick v. Township of Scott*, this Court found that state-litigation requirements for takings claims established by the case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* were impracticable. *Knick v. Twp. of Scott*, 588 U.S. 180, 181 (2019). There, this Court held that the *Williamson County* decision was unworkable because it effectively denied property owners full access to their constitutional right to seek relief in federal court. Likewise, this Court in *Payne v. Tennessee* overruled precedent established in *Booth v. Maryland* and *South Carolina v. Gathers* for being unworkable. *Payne*, 501 U.S. at 830. When overruling *Booth* and *Gathers,* this Court acknowledged that those precedents were decided by narrow margins, had spirited dissents, members of the Court spoke out against the decisions, and lower courts struggled to consistently apply the law established in those cases. *Id*. at 828-830.

Here, *Kelo* fails to establish a workable rule because it ignores the Framers' intent to limit the government's ability to seize private property. As well, like the decisions in *Booth* and *Gathers*, *Kelo* was decided on a narrow 5-4 margin and accompanied by strong dissents by Justices Sandra Day O'Connor and Clarence Thomas. Ilya Somin, *Putting Kelo in Perspective*, 48 CONN. L. REV. 1551, 1553 (2016). Additionally, *Kelo*, like *Booth* and *Gathers*, has also generated negative reactions by members of the Court. Notably, Justice Scalia compared *Kelo* to *Dred Scott* and expressed that both cases are instances where the Court "made mistakes of political judgment, of estimating how far . . . it could stretch beyond the text of the Constitution without provoking overwhelming public criticism and resistance." *Id*. at 1555. It is for these reasons the *Kelo* decision is unworkable and has consequently left property owners vulnerable to broad and unchecked exercises of the government's eminent domain power.

c. Consistency With Other Related Decisions

Kelo is also inconsistent with this Court's related decisions on the Takings Clause. The *Kelo* decision relied on the holdings in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* to interpret the meaning of public use under the Takings Clause. *Kelo*, 545 U.S. at 476. However, a critical distinction between *Kelo* and these prior decisions renders *Kelo* inconsistent. Both *Berman* and *Midkiff* addressed situations where private uses could indeed serve a public purpose, but these cases involved exceptional circumstances. In *Berman*, this Court upheld the taking of property in a blighted area for redevelopment designed to improve urban living conditions. *Berman v. Parker*, 348 U.S. 26, 30 (1954). The justification for the taking rested on its purpose to remedy a significant public problem—urban blight—which posed a direct threat to the community's well-being. *Id*. at 34–35. Similarly, *Midkiff* involved legislation aimed at reducing land concentration in Hawaii, which was viewed as critical to resolving housing issues in the state. *Haw. Hous. Auth.*

v. Midkiff, 467 U.S. 229, 233 (1984). There, the Court held that the takings were justified because they promoted equitable land distribution and advanced public welfare. *Id*. at 244.

Conversely, *Kelo* concerns the taking of private property and transferring it to a private developer as part of a luxury development project intended to stimulate economic growth. *Kelo*, 545 U.S. 475. Importantly, both *Berman* and *Midkiff* emphasized that the takings at issue directly addressed pressing public concerns, such as blight and land oligopoly, which had significant societal implications. *Berman*, 348 U.S. at 34-35; *Midkiff*, 467 U.S. at 232. Unlike *Kelo*, the takings in those cases were necessary to confront substantial social problems. The taking in *Kelo*, however, did not aim to remedy blight or other public harms. *Kelo*, 545 U.S. at 475. This absence of an immediate public crisis fundamentally distinguishes *Kelo* from *Berman* and *Midkiff*. Furthermore, *Kelo* broadened the definition of public use to include projects aimed solely at economic development, without addressing a specific existing public issue. *Id*. Therefore, the reasoning in *Kelo* departs from the more traditional interpretations of the Public Use Clause established in *Berman* and *Midkiff*.

d. Reliance on The Decision

The public backlash in response to *Kelo* has resulted in this Court's minimal reliance on the decision. Since the publication of the *Kelo* decision in 2005, this Court has only relied on the case four times. *See Haywood v. Drown*, 556 U.S. 729, 752 (2009); *Vartelas v. Holder*, 566 U.S. 257, 279 (2012); *Horne v. Dep't of Agric.*, 570 U.S. 351, 370 (2015); *Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2423 (2021).

Likewise, the negative reaction from *Kelo* has also prompted states to take action to protect their citizens. Since the *Kelo* decision, 44 states have changed their state laws, and 11 states have amended their constitutions in an attempt to provide their citizens with greater protections. Dana

Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82, 84 (2015). The majority of these changes have tightened the meaning of public use and public purpose to narrow the government's ability to exercise its eminent domain power. *Id*. at 85. Considering the minimal reliance on Kelo by this Court and the widespread legislative backlash across the states, the existence of a few outliers, does not justify upholding the decision.

B. A Permissible Taking For Public Use Should Be Defined Through Traditional Constitutional Interpretation And State Law Guidance

The Court's decision in *Kelo* threatens to dismantle the very essence of what it means to own property, sacrificing deeply rooted values for the sake of private development, and leaving countless homeowners vulnerable and unheard. As Justice Thomas emphasized in his *Kelo* dissent, "[e]ven under the 'public purpose' interpretation" of the Public Use Clause, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights." 545 U.S. at 517 (Thomas, J., dissenting). This underscores the Framers' intent to limit the government's power to expropriate private property solely for purposes that genuinely serve the public interest.

i. The Framers' intended public use to have a narrow meaning because they wanted to protect property rights from potential government abuses

When James Madison first drafted the Takings Clause he wrote "[n]o person shall be . . . deprived of . . . property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Amendments to the Constitution*, [8 June] 1789, Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-12-02-0163 (last visited Oct. 20, 2024). Madison wrote the Takings Clause during an era where handing over property to the Monarchy was a common practice in England. His original language places a magnifying glass on his desire to protect the people from the government. For instance, Madison wrote, ". . . I think we should

obtain the confidence of our fellow citizens, in proportion as we fortify the rights of the people against the encroachments of the government." *Id*. Additionally, he also expressed "that all power is originally vested in . . . the people. The government . . . ought to be exercised for the benefit of the people, which consists . . . with the right of acquiring and using property. . . ." *Id*. This further establishes that the Framers intended to make clear that an individual's right to property is fundamental; therefore, a property owner should not be forced to give up their rights unless the government takes the property for a valid public use and just compensation is provided.

This Court should adopt an originalist approach when interpreting public use in the Takings Clause to realign with the Framers' intent. This interpretation is also consistent with the principles outlined in Justice O'Connor's dissent in *Kelo*. Using this Court's precedent, Justice O'Connor identified a clear boundary for when taking complies with the public use requirement. *Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting). Justice O'Connor asserted that public use is when the government transfers private property to public ownership for roads, hospitals, or military bases. *Id*. A valid public use is also when the government transfers private property to private parties and avails the property for public usage, such as constructing railroads, public utilities, or stadiums. *Id*. Lastly, Justice O'Connor expressed that the government satisfies the public use requirement when the taking serves a public purpose. *Id*.

ii. *The Court should adopt an interpretation of public use consistent with state law guidance*

Furthermore, in determining what constitutes a taking for public use, this Court can look to state laws and practices for guidance in establishing a more precise and workable definition. *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). Currently, many states across the country have endorsed public use tests and have expressly defined what constitutes public use through constitutional amendments and enactments of new statutes.

In the wake of *Kelo*, many states have enacted additional safeguards for property rights, aiming to insulate themselves from the expansive precedent set by the decision. For instance, South Dakota, adopted the "use by the public test" which requires there be a "use or right of use on the part of the public or some limited portion of it." *Benson v. State*, 2006 S.D. 8, ¶ 42 (S.D. 2006) (quoting *Illinois Cent. R.R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 77 (S.D. 1913)). As well, Michigan has also enacted statutes that restrict the transfer of private property to private entities unless the proposed use possesses substantial public attributes, such as rigorous public oversight, accountability, or the remediation of blight. Mich. Comp. Laws ANN. § 213.23 (West 2007). Such takings are constitutionally justified when they advance public welfare by addressing a significant public need, not when they promote private commercial interests or economic development for the benefit of specific individuals or entities. Furthermore, the Louisiana Constitution was amended in the wake of *Kelo* to enumerate what is considered a public purpose. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So. 3d 243, 250 (La. 2018). Under the amendments, the definition of public purpose is to clearly delineated objectives such as the development of public ports and airports. *Id*. Furthermore, the Louisiana Constitution expressly forbids the appropriation of private property for purposes of economic development or to suppress competition with government-operated enterprises. *Id*. at 251.

Additionally, state judiciaries have also taken steps to further property protections after *Kelo*. The Supreme Court of Oklahoma, in *Board of County Commissioners of Muskogee County v. Lowery*, held that "economic development alone does not constitute a public purpose and, therefore, does not constitutionally justify the County's exercise of eminent domain." *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 650 (Okla. 2006). Likewise, the Ohio Supreme Court, in *Norwood v. Horney*, concluded that "economic benefit to the government and

community, standing alone, does not satisfy the public-use requirement" under the Ohio Constitution. *Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006).

These state interpretations align with the Framers' original intent that public use should be limited to essential governmental functions that benefit the community, rather than facilitating private gain. Consequently, *Kelo* should be overruled to restore the integrity of the precedents that prioritizes public benefit and protects individual property rights. Both the textual framing of the Takings Clause and the judicial interpretations by the states emphasize a profound respect for property rights, highlighting a constitutional commitment to protecting individuals from governmental overreach. Such interpretations serve not only to uphold individual rights but also to maintain the integrity of democratic governance, ensuring that the power to take private property is exercised with restraint and only for the public good. Takings of this nature are constitutionally justified because they advance the public welfare by addressing a significant public need, not when they promote private commercial interests or economic development for the benefit of specific individuals or entities.

II. THE SELF-EXECUTING NATURE OF THE TAKINGS CLAUSE PROVIDES A DIRECT CAUSE OF ACTION FOR JUST COMPENSATION

The Fifth Amendment was designed to be self-executing because the Framers viewed the protection of private property as a bedrock to a free society. The principle that the Takings Clause is an essential element of liberty explains why it was included within the Bill of Rights. *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 140 N.M. 528, 530-31 (2006). This same principle also provides that the Takings Clause is self-executing.

A. The Framers' Intended The Fifth Amendment To Be Self-Executing Because They Believed That Property Rights Were Fundamental to Individual Liberties

This Court has held that relying on the history of constitutional text is more legitimate than asking the court to make a "difficult empirical judgement." *N.Y. State Rifle & Pistol Ass'n v. Bruen*,

597 U.S. 1, 25 (2022). To understand the Takings Clause, it is best to turn to James Madison, the drafter of the Fifth Amendment. Madison was a strong defender of property rights, as a legislator for the state of Virginia he opposed government seizure of loyalist property and sponsored a bill that gave compensation for unimproved land. William Micheal Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 709 (1985). Madison also intended for the Bill of Rights to be utilized by the judiciary to review the actions of the federal government. *Id*. at 710. In his speech proposing the Bill of Rights, Madison declared "independent tribunals of justice will consider themselves in a peculiar manner guardians of those rights. . . ." James Madison, Speech Proposing Bill of Rights (June 8, 1789). While James Madison included the Just Compensation Clause on his own initiative, the addition was not a new or radical idea. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 509 (2004). Rather, the provision was inspired by the Vermont Constitution, the Massachusetts Constitution, and the Northwest Ordinance all which contained Just Compensation Clauses. *Id*. The Just Compensation Clauses found within those documents came to be because of long histories of governments unjustly taking land and the rejections of previous state constitutions for failing to adequately protect property rights. *Id*. Maddison's addition of the Just Compensation Clause in the Fifth Amendment was written within the context of these documents and emphasizes that Madison intended to mandate and provide a remedy for property owners whenever the government committed a taking. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct Physical Taking Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 208 (1999). Madison's views on protecting property were also shared amongst other Framers. For instance, Alexander Hamilton famously stated during the Constitutional Convention that "one great object of Government is personal protection and security of property. . . ." *Id*. at 195. Likewise, John Adams

also expressed that "property must be secured...or liberty cannot exist." James W. Ely. Jr., *Property Rights in American History*, HILLSDALE COLL., https://www.hillsdale.edu/wp-content/uploads/2016/02/FMF-2008-Property-Rights-in-American-History.pdf. The history of the Fifth Amendment post ratification also demonstrates the importance of property rights in American society. During this time many states began to include property clauses in their own constitutions. *Id*. at 5. And the Takings Clause was the first constitutional provision to be incorporated against the states. *Chic. Burlington & Quincy Ry. v. Chicago*, 166 U.S. 266, 239 (1897).

The Framers' intent to protect property rights and mandate a remedy whenever a taking occurs shows that the nature of the Fifth Amendment is self-executing. Because the Takings Clause has its own self-executing scheme, this Court needs only to look to the Fifth Amendment to decide this case. *see United States v. Bromes*, 568 U.S. 6, 11 (2012). Thus, here Petitioners can recover by using the Fifth Amendment as a procedural vehicle.

B. This Court's Almost Century Old Precedents Have Long Recognized That The Fifth Amendment Is Self-Executing

The principle that the Fifth Amendment is self-executing and triggered once a taking occurs, has a deeply rooted foundation that is almost 100 years old in this Court's jurisprudence. In 1933, the plaintiff in *Jacobs v. United States* filed suit against the government before eminent domain proceedings were formally initiated. *Jacobs v. United States*, 290 U.S. 13, 15 (1933). This Court held that it does not matter the manner a property owner intends to recover for just compensation, because the right is secured by the Fifth Amendment. *Id.* at 16. Likewise, 47 years after *Jacobs* this Court recognized again that the Fifth Amendment is self-executing in *United States v. Clarke*. There, this Court found that a claimant is entitled to bring an inverse condemnation action directly under the Takings Clause because of the self-executing nature of the

Fifth Amendment. *United States v. Clarke*, 445 U.S. 253, 257 (1980). Under an inverse condemnation action, the property owner files suit against the government after a taking has occurred but before the government has initiated formal condemnation proceedings. *Id*. Further, in *First English Evangelical Lutheran Church v. County of Los Angeles*, this Court asserted that a landowner has the power to file a condemnation suit because of the self-executing characteristics of the Takings Clause. *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 315 (1987). In *First English*, the plaintiff sought damages for a temporary regulatory taking when the defendant enacted a city ordinance that prohibited construction on the plaintiff's property. *Id*. at 308. The trial court dismissed the claim asserting that there was no law in California that created a cause of action to support the lawsuit. *Id*. at 308-09. This Court ultimately concluded that the plaintiff could recover because just compensation lawsuits do not require statutory recognition because they are grounded within the constitution. *Id*. at 315 (quoting *Jacobs*, 290 U.S. at 16). The principle that the Fifth Amendment is self-executing was recognized by this Court most recently in the 2019 case *Knick*. In *Knick*, the Federal District Court dismissed the plaintiff's takings claim because she did not pursue the action in state court. *Knick*, 588 U.S. at 187. In deciding *Knick*, this Court once again embraced that the Fifth Amendment is self-executing because a claimant's right to recover for a taking "rests [upon] the Fifth Amendment." *Id*. at 190.

The Court's framework establishing that the nature of the Takings Clause is self-executing has also been embraced by various circuit courts across the country. For instance, the 9th Circuit in *Seven Up Pete Venture v. Schweitzer* acknowledged that this Court has long established that the Takings Clause is self-executing and statutory recognition is not required. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953-54 (9th Cir. 2008). In 2021, the 4th Circuit also held that this Court recognized the Takings Clause is self-executing decades ago. *Zito v. N.C. Costal Res.*

Comm'n, 8 F.4th 281, 287 (4th Cir. 2021). As well, the 3rd Circuit also noted that this Court's precedent provides that the Fifth Amendment is self-executing. *Davis v. California (In re Venoco LLC)*, 998 F.3d 94, 110 (3rd Cir. 2021).

In 2024, this Court was faced with the narrow question of whether a claimant may file suit under the Takings Clause when they have no statutory cause of action in *DeVillier v. Texa*s. In *DeVillier*, the majority opinion declined to rule on the issue of whether the Fifth Amendment is self-executing because the Court found that a Texas state law provided the plaintiff with a possible cause of action. *DeVillier v. Texa*s, 601 U.S. 285, 292 (2024). However, the majority opinion emphasized that this Court's precedent has long and consistently held that property owners have a right to sue the government when a taking occurs because of the self-executing force of the Takings Clause. *Id*. at 291. While the *DeVillier* Court is correct in its assertion that this Court has never directly addressed the issue of whether the Fifth Amendment provides a cause of action. The almost centuries of precedent recognizing that the Takings Clause is self-executing shows that a viable takings action can be brought under it.

In the present case, Petitioners filed suit on March 15, 2023, after Respondents initiated an eminent domain proceeding. R. at 3. While this lawsuit does not fall within the definition of an inverse condemnation action, the nature and objectives are the same: seek just compensation from the government. Here, Petitioner's lawsuit like all inverse condemnation actions is an affirmative step by the property owners to demand compensation for a taking by the government. The only difference among inverse condemnation actions and actions like the case at bar, is that the state of New Louisiana beat Petitioners to the courthouse. Accordingly, when the constitutional framework established by this Court in *Jacobs*, *Clarke*, *First English,* and *Knick*, is applied to the facts in this case, the outcome is that the self-executing nature of the Takings Clause creates a cause of action

for Petitioners. It is this constitutional framework that circuit courts across this country have used and applied to their own cases to find again and again that the Fifth Amendment is self-executing.

Furthermore, here, the case at bar rest on an entirely different set of facts and issue than *DeVillier*. In *DeVillier*, the Court found that because Texas state law provided the plaintiffs with a cause of action, the claimants should proceed with their claims under the applicable Texas law. However, this case is different from *DeVillier* in a fundamental way. Unlike *DeVillier*, here Petitioners do not have a cause of action under New Louisiana law. This is because the State refused to waive sovereign immunity. R. at 2. Because New Louisiana code requires the State to waive sovereign immunity for a property owner to recover for a taking, Petitioners only avenue for recovery is through the Fifth Amendment. *See* NL Code § 13:5109. Consequently, if the property owners are not able to bring their action under the Fifth Amendment, they will be denied the right to just compensation.

C. The History of Takings Clause Litigation Shows That A Statute Is Not Required To Recover Just Compensation

Respondents erroneously argue that the property owners must rely on another source of law to recover like the Tucker Act, 28 U.S.C. § 1491, and 42 U.S.C. § 1983. R. at 3. The Tucker Act is merely a jurisdictional statute that waives the government's shield of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 215 (1983); *see also United States v. Testan*, 424 U.S. 392, 398 (1976). The Tucker Act provides in part that the Court of Claims has jurisdiction over claims against the United States founded upon either the Constitution or acts of Congress. 28 U.S.C. § 1491. Whereas 42 U.S.C. § 1983 allows a claimant to file suit against a state actor for violating her rights once sovereign immunity is waved. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). Under § 1983 every person who, under color of state law, deprives a citizen of the United States of any rights, privileges, or immunities secured by the Constitution and laws is

liable to the injured party. 42 U.S.C. § 1983. Thus, while the Tucker Act does not provide a claimant with a cause of action, § 1983 provides a cause of action only when violations are committed by persons acting under the color of state law. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). The parties in this case agree that the Tucker Act and § 1983 do not apply to this case. R. at 4. Additionally, the nature and history of takings litigation and the Fifth Amendment also rejects Respondent's argument that Petitioner must rely on a statute to recover just compensation.

Before the enactment of the Tucker Act, claims for violations of the Takings Clause were brought through private acts of Congress. *Lib. Of Congress, v. Shaw*, 478 U.S. 310, 316 n.3 (1985). This was because during this period all monetary claims of relief against the United States were deemed as financial questions for Congress rather than legal questions for the judiciary. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 626 (1985). However, by 1848 the Congressional Claim Committee that delt with these claims was in crisis. A report on the system at the time "described the system as plagued with 'evils,' of unparalleled injustice that, and wholly discreditable to any civilized nation." *Id*. at 649. There were reports of unpaid claims, ethical violations, and questions as to whether Congress as a political institution was the proper forum to resolve claims against the United States. *Id*. Because of the dissatisfaction, a compromise in the Senate lead to the creation of the Court of Claims, which Congress treated as only providing advisory opinions. *Id*. at 652. The frustration surrounding Congress's approach to claims reached a boiling point when President Lincoln in his annual address urged Congress to pass amendments making decisions of the Court of Claims final. *Id*. at 655. The pressure applied to Congress by President Lincoln eventually led the passage of amendments that gave finality to decisions by the Court of Claims. However, Congress still retained jurisdiction over takings claims. Eventually, in

1887 Congressman John Randolph Tucker sponsored the creation of the Tucker Act to "give the Court of Claims full jurisdiction over all legal, equitable, and admiralty claims against the United States." *Id*. at 664.

Furthermore, the history of takings litigations also shows that the Fifth Amendment can be used as a cause of action to recover just compensation. In 1898, this Court in *Norwood v. Baker* ruled on a takings case where the claimant relied on the Fourteenth Amendment to recover from the state of Ohio for a taking. *Norwood v. Baker*, 172 U.S. 269, 277 (1898). In *Norwood*, this Court emphasized that due process prescribed by the Fifth Amendment mandates compensation when a taking occurs. *Id*. As well, in 1926 this Court again heard a case where the claimant used the Fourteenth Amendment as a procedural vehicle to sue a state for just compensation. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926). And again in 1930 the case *Dohany v. Rogers*, this Court was faced with a takings case where the claimant used the Fourteenth Amendment to sue the state of Michigan for taking the claimant's land to build a railway. *Dohany v. Rogers*, 281 U.S. 362, 363 (1930). Additionally, in the late 19th Century, state court claimants also brought actions under the Takings Clause. In 1885, the Supreme Court of California held that a property owner can bring a cause of action directly under the Takings Clause. *Reardon v. City & County of San Francisco*, 66 Cal. 492, 504 (Cal. 1885). Likewise, the Supreme Court of Nebraska also found that the Takings Clause was a viable action for a claimant to recover just compensation. *Harmon v. City of Omaha*, 17 Neb. 548, 549 (Neb. 1885).

Here, Respondent's claim that statutes like the Tucker Act and § 1983 are necessary for initiating a cause of action is directly contradicted by the historical context of takings litigation. As Justice Rehnquist noted in his 1978 dissent in *Monell v. Department of Social Services*: "it has not been generally thought, before today, that § 1983 provided an avenue of relief from

unconstitutional takings. Those federal which have granted compensation against state and local governments have resorted to the implied right of action under the Fifth and Fourteenth Amendments." *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 724 n.4 (1978) (Rehnquist, J., dissenting). Contrary to Respondent's argument Congress's enactment of the Tucker Act was to address the failing Congressional Claims Committee, not because it thought a statute was needed to bring a takings claim. In addition, the decades of cases in both federal and state courts that have relied on the Takings Clause show that the property owners in this case do not need to depend on another source of law to obtain just compensation. In essence, Respondents, refusal to waive sovereign immunity to allow Petitioners to recover under New Louisiana law and their subsequent assertions that a statue must be used for the property owners to recover, is an attempt to close the courthouse doors on Petitioners. This attempt to deny Petitioners a right to recovery under the Takings Clause is inconsistent with the intentions of the Framers and prevailing public policy, and should not be sustained by this Court.

Conclusion

For the foregoing reasons, Petitioners respectfully urge this Court to reverse the Thirteenth Circuit. *Kelo* ought to be reversed because the expanded meaning of public use is contrary to the Framers' intentions. As well, this Court should decline to apply the doctrine of stare decisis when deciding the present case because *Kelo* is fundamentally flawed, badly reasoned, inconsistent with this Court's precedent, and has been minimally relied on by this Court. Instead, the Court should revert to the Framers' narrow meaning of public use in order to protect property rights from potential government abuses. Additionally, the self-executing force of the Takings Clause allows Petitioners to rely on the provision as a procedural vehicle. The intent of James Madison and the other Framers' when drafting the Fifth Amendment shows that claimants are entitled to recover directly under the Takings Clause. As well, this Court's almost century old framework has consistently embraced the principle that the Takings Clause is self-executing. Lastly, the history of takings litigation reveals that statutory recognition is not required to bring a takings cause of action and that claimants may rely directly on the Takings Clause to recover just compensation.

Respectfully submitted,

/s/ Competition Team # 24
Competition Team # 24
Counsel for the Petitioners